COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

POLICY REVIEW

CONSULTATION PAPER

October 2004*

***Amended December 14, 2004**

COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

POLICY REVIEW

CONSULTATION PAPER

TABLE OF CONTENTS

I. Introduction 1

II. The RCMP's National Security Mandate 4

1. The RCMP's Mandate 5
2. Intelligence–led Policing and the RCMP's National Security Intelligence Function 6
3. Interaction with other Agencies 8
4. Organization of National Security Activities within the RCMP 9
5. Dissemination of Information 10
6. Accountability Mechanisms 11

III. Review Mechanisms 12

1. Maintaining National Security 12
2. Protecting Rights and Freedoms 14
3. Ensuring Accountability 16

IV. Domestic Models 20

1. Review agencies for police forces 20
2. Review agencies for security intelligence 24
3. Other accountability mechanisms 25

V. International Models 27

1. Australia 29
2. Belgium 29
3. Germany 30
4. New Zealand 31
5. Norway 31
6. Sweden 32
7. United Kingdom 33
8. United States 34
9. Next Steps 35

VI. Options 35

1. Option A: Status quo 36

106-03486/

2. Option B: Enhanced powers for the Commission for Public Complaints Against the RCMP 37
3. Option C: Creation of a new review mechanism for RCMP national security activities 38
4. Option D: SIRC common to RCMP and CSIS 39
5. Option E: SIRC-model common to all federally-regulated national security operations 40
6. Option F: Parliamentary review/oversight 41
7. Option G: Other models and variations 42

APPENDIX A LIST OF ACRONYMS 43

APPENDIX B LIST OF BACKGROUND PAPERS AND OTHER REFERENCES 44

COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

POLICY REVIEW

CONSULTATION PAPER*

I. Introduction

The Terms of Reference direct me to conduct a Factual Inquiry and a Policy Review. The Factual Inquiry is concerned with the actions of Canadian officials in relation to Mr. Arar. The Policy Review directs me to make recommendations on an independent, arm's-length review mechanism for the activities of the RCMP with respect to national security based on:

i) an examination of models, both domestic and international, for that review mechanism; and

ii) an assessment of how the review mechanism would interact with existing review mechanisms.

As part of the Policy Review, I will be carrying out a thorough public consultation process about the recommendations that I may make to the government. I have therefore prepared this Consultation Paper, which has two purposes. The first is to provide background information to foster discussion of the questions raised by the Policy Review. The second is to identify specific issues which at this point seem to me to be at the heart of this part of my mandate.

---

* In preparing this Consultation Paper and the accompanying background papers, the Commission was ably assisted by a number of individuals. I would like to thank the members of the Advisory Panel, Monique Bégin, Alphonse Breau, Kent Roach, Martin Rudner and Reg Whitaker for their assistance and contributions. In addition, I am grateful for the contributions of Martin Friedland. Research assistance was also provided by Andrew Fraser, Shawna Godbold, Morgana Kellythorne, Shaun Laubman and William Thompson. Finally, I would like to thank the Commission's Policy Review Legal Counsel, Ronald Foerster, Freya Kristjanson and Andrea Wright, for their work in coordinating and contributing to the documents.

The facts and issues set out in this Paper are based in large part upon research which is set out in eight background papers. These documents are being translated, and each will be published on the Commission's website as its translation is completed. Please check the Commission's website (www.ararcommission.ca) for updates on the availability of these papers.

In some instances, the background papers set out specific questions which may be considered in formulating the recommendations for the Policy Review. Many of these questions are also set out in a "List of Issues", which is available on the Commission's website.

These eight background papers are:

- The RCMP and National Security ("RCMP Paper");
- Statutory Framework for the RCMP's National Security Activities ("Statutory Framework Paper");
- National Security and Rights and Freedoms ("Rights and Freedoms Paper");
- Accountability and Transparency ("Accountability Paper");
- Police Independence ("Police Independence Paper");
- Domestic Models of Review of Police Forces ("Review of Police Forces Paper");
- Accountability of Security Intelligence in Canada ("Security Intelligence Accountability Paper"); and
- International Models of Review and Oversight of Police Forces and Security Intelligence Agencies ("International Models Paper").

I note that the RCMP Paper and the International Models Paper are preliminary. Our research continues on these topics, as well as others relevant to my mandate.

There are two aspects to the mandate for the Policy Review that warrant specific comment. First, a central issue in the Policy Review will be the nature of any review mechanism that I may recommend. For the purposes of the public consultation process, I

intend to explore the full range of possibilities for a review mechanism, ranging from the status quo, to a new complaints-based process, to broader models including some that would have an audit power and/or provide policy direction to the RCMP in carrying out national security activities.

The second matter that must be borne in mind is that the RCMP is a law enforcement agency. Conventionally, the types of review mechanisms established for security and intelligence agencies, such as CSIS, have differed from those that have been established for law enforcement agencies. The principle of police independence has been a factor in the use of different models. However, two developments in recent years raise the question of whether this distinction between police and security intelligence review models is still appropriate, at least in the context of the RCMP's national security activities. The first development is an increased emphasis on intelligence-led policing. Second, Parliament has created new criminal offences, which criminalize most aspects of terrorism. Given these developments, I may have to consider the extent to which the RCMP's national security activities may require a different review process.

At the outset, it will be important to determine what the national security activities of the RCMP are, and whether the current review mechanisms for the RCMP are appropriate for those activities. If the answer to the latter question is no, I must then consider what is the appropriate review mechanism. In section 6 of this Paper, I have set out a list of options for possible review models with a view to generating a wide ranging discussion.

It is worth noting that the Policy Review is only one of the ways that the government is presently addressing issues relating to national security. In April 2004, the government published a new National Security Policy which provides for an integrated approach to national security issues and which identifies three main objectives: protecting Canada and Canadians at home and abroad; ensuring Canada is not a base for threats to our allies; and contributing to international security. The government has also proposed the establishment of a National Security Committee of Parliamentarians, and a Cross-Cultural Roundtable on Security Issues. It is important that the review mechanism

contemplated in the Policy Review not be viewed in isolation; rather it should be considered in the context of Canada's overall approach to matters relating to national security.

The process for the Policy Review from this point will be as follows. The background papers are being translated, and will be made available on the Commission's website as the translations are completed.

Once all the background papers have been published on the website, I will call for written submissions from individuals, groups and organizations including government institutions with respect to any matter that they consider relevant to this part of my mandate. Submissions may include suggestions for further research; answers to questions raised in this Paper, in the background papers and in the List of Issues; and submissions relating to specific recommendations that I should make.

Following receipt of public submissions, the Commission will schedule a series of public meetings, at which many participants will be invited to make oral submissions. It is possible that some of the public meetings will precede some of the public hearings in the Factual Inquiry. If it turns out that evidence subsequently received in the public hearings in the Factual Inquiry is relevant to the issues raised in the Policy Review, I will provide an opportunity, for those who wish to do so, to supplement their submissions in the Policy Review based on that evidence.

II. The RCMP's National Security Mandate

My analysis of the issues surrounding an independent review mechanism for the RCMP's national security activities is dependent upon an understanding of what those national security activities are. The RCMP Paper prepared by the Commission sets out both the historic and current role of the RCMP in this area, and discusses how the RCMP exercises its national security mandate and its interaction with other agencies, both domestic and foreign.

In this section, I set out in summary form those aspects of the RCMP's role that I view as particularly important to my mandate in the Policy Review. This summary should be read together with the RCMP Paper, the Statutory Framework Paper and the Police Independence Paper, as well as Exhibit 2 from the Factual Inquiry entitled "The Legislative and Organizational Framework for the National Security Environment in Canada".

1. The RCMP's Mandate

The RCMP is Canada's national police force. Its overall mandate is to preserve the peace, prevent crime and enforce the law. It is responsible for the enforcement of all federal laws, with the exception of the vast majority of the *Criminal Code*, in all Canadian provinces and territories. It is also responsible for enforcement of all of the *Criminal Code*, and for provincial and municipal law offences in those jurisdictions that have contracted with the RCMP for its policing services. Currently, all provinces (except Ontario and Québec), the three territories, 198 municipalities and 192 First Nations communities have contracted with the RCMP to provide such policing services.

By virtue of section 6 of the *Security Offences Act*, the RCMP has "primary responsibility" throughout Canada for the prevention, investigation and enforcement of national security offences and for offences against internationally protected persons. These are a broad body of offences found primarily in the *Criminal Code* and the *Security of Information Act* relating to conduct constituting a threat to the security of Canada.

Since September 11, 2001, the national security activities of the RCMP have expanded significantly. As a result of increased vigilance, and the *Anti-terrorism Act* amendments to the *Criminal Code*, the *Security Offences Act* and other legislation, there are an expanded number of crimes and investigations relating to national security and terrorism in particular. Virtually all actions relating to terrorism have now been criminalized and are within the mandate of the RCMP. This potentially includes crimes such as money laundering or theft, which, if they are related to a terrorist group or terrorist objective,

become national security offences. The RCMP has also been given extraordinary powers in connection with national security including preventive detentions, the power to convene investigative hearings and certain additional powers to carry out electronic surveillance in respect of such crimes. These powers are subject to approval by the Attorney General and to judicial control.

2. Intelligence–led Policing and the RCMP's National Security Intelligence Function

Until 1984, the RCMP was the primary federal agency responsible for the gathering and dissemination of national security intelligence. This function involves the gathering and analysis of information about potential threats to the security of Canada in order to advise the federal government. The responsibility for intelligence gathering was taken from the RCMP and given to CSIS with the enactment of the *CSIS Act* in 1984. The *CSIS Act* made CSIS responsible for the collection and analysis of national security intelligence and for reporting to and advising the federal government in relation to national security threats. The creation of CSIS followed on the recommendations of the McDonald Commission which concluded, for a number of reasons set out in detail in the RCMP Paper and the Security Intelligence Accountability Paper, that it would be better for the security intelligence function to be contained in a civilian agency which was more directly accountable to the Prime Minister, Cabinet and Parliament.

However, even with the creation of CSIS, the RCMP maintains a significant intelligence gathering capability related both to its national security and general mandates. The continued involvement of the RCMP in this activity largely arose out of a new approach to policing – known as intelligence-led policing – adopted by the RCMP in the late 1980s. In simple terms, intelligence-led policing means policing that is guided by information about potential crimes and potential criminals before any breach of the law has necessarily occurred. Intelligence-led policing grew out of a change in focus from the apprehension of criminals to a greater emphasis on crime prevention. To effectively carry out its crime prevention mandate, the RCMP gathers information about the

capabilities, vulnerabilities, limitations and intentions of criminals and criminal organizations.

Intelligence-led policing is applied throughout the RCMP, but I note that its application to the national security mandate has resulted in a significant national security intelligence gathering function in the RCMP. I am obviously very interested in this development and its implication for the type of review mechanism that is appropriate. In particular, the fact that the RCMP's intelligence-gathering activities now resemble, in certain ways, those of CSIS, raises the issue of whether the powers of review which have been given to the Security Intelligence Review Committee (SIRC), which reviews the activities of CSIS, are appropriate for the RCMP's national security activities. However, as is explored in greater detail in the RCMP Paper, the purpose for which the RCMP and other police agencies gather intelligence is different from the purpose for which intelligence is gathered by CSIS. The RCMP gathers intelligence to support its crime prevention and criminal apprehension responsibilities, while CSIS collects information in order to advise the government on threats to the security of Canada. I welcome submissions on this distinction and on how similarities and differences between the activities of CSIS and the RCMP might affect my consideration of review mechanism options.

The specific activities of the RCMP in connection with national security involve a combination of the activities undertaken by other police forces and security intelligence agencies. These include: collection, maintenance and analysis of national security related information and intelligence; sharing of such information and intelligence with other agencies both domestic and foreign; preparation of analyses, threat assessments and other methods of support for internal and external purposes; investigations of crimes related to national security; investigations and activities aimed at preventing the commission of national security crimes ("countering"); and the protection of specific national security targets.

3. Interaction with other Agencies

Despite the separation of functions, the RCMP and CSIS were from the outset intended to have a complementary relationship as outlined in the relevant legislation and in a memorandum of understanding (MOU) between CSIS and the RCMP. The MOU provides that the RCMP is to rely on CSIS for intelligence relevant to national security offences and CSIS is to provide the RCMP with intelligence relevant to its national security enforcement and protective responsibilities. The RCMP is also required to provide CSIS with operational support in certain circumstances.

The RCMP's interaction with other agencies involved in national security is not restricted to CSIS. A number of federal departments and agencies have mandates related to national security, including Foreign Affairs Canada (FAC); the Communications Security Establishment (CSE), an agency that reports to the Minister of Defence and focuses on signals intelligence; the Department of National Defence (DND), which collects intelligence related to its mandate; and the Financial Transactions and Reports Analysis Centre of Canada (FinTRAC), which is authorized to gather information and detect financial transactions that may constitute threats to the security of Canada. The RCMP interacts with all of these agencies. In fact, their activities are becoming increasingly integrated. For example, the government of Canada has recently created an Integrated Threat Assessment Centre (ITAC), to be housed within CSIS. ITAC's mandate is to create comprehensive analyses of all available information on potential threats to Canada and make those analyses available to all agencies that require them. ITAC is supported by and staffed with representatives of a number of departments including the RCMP, CSIS, Public Safety and Emergency Preparedness Canada, the CSE and DND.

The overlap of functions among these agencies and their increasing integration raise questions about whether and how the RCMP's activities in relation to national security can be isolated for review purposes. They also raise the question of the interaction of review mechanisms that exist for the other agencies. In this regard, it is also important to note that the RCMP has many interactions, ranging from information sharing to joint investigations, with other police services, both within Canada and outside. For example,

since 9/11, the number of interactions with American police forces has increased significantly.

4. Organization of National Security Activities within the RCMP

Within the RCMP, national security activities are carried out at both the Headquarters and divisional levels. Pursuant to a November 2003 Ministerial Directive, national security investigations are to be coordinated at Headquarters. Headquarters' functions are located within the Criminal Intelligence Directorate, where the majority of national security information and intelligence is analysed and from which it is disseminated within the RCMP and shared with outside bodies. Units within Headquarters are also responsible for the preparation of threat assessments and specific projects such as the Canadian Air Carrier Protective Program, which places RCMP officers on certain international flights; and for providing support for the listing of entities as "Terrorist Entities" under the *Criminal Code*.

At the divisional level, operational functions are carried out by National Security Investigations Sections (NSIS) and, since 9/11, by Integrated National Security Enforcement Teams (INSETs). INSETs carry out investigations relating to the RCMP's national security mandate; and are located in Toronto, Ottawa, Vancouver and Montreal. They are an illustration of the RCMP's movement toward integration with municipal and provincial police services as well as other government agencies in support of its mandate. The RCMP has stated that approximately 285 of its members are engaged in national security functions at Headquarters and through the four INSETs.

Other integrated teams relevant to national security are Integrated Border Enforcement Teams (IBETs) and Integrated Immigration Enforcement Teams (IIETs). IBETs carry out investigations related particularly to border security; and IIETs carry out investigations related to the RCMP's mandate, which it shares with the Canada Border Services Agency (CBSA) to enforce certain provisions of the *Immigration and Refugee Protection Act* and the *Citizenship Act*.

The involvement of multiple agencies – both federal, provincial and foreign – in these integrated teams has jurisdictional implications for the consideration of review mechanism options. For example, one MOU that has been put into evidence in the Factual Inquiry provides that municipal police operating as part of INSETs remain subject to the accountability mechanisms applicable to the municipal force. It also raises issues about the desirability of a review mechanism with jurisdiction over a subject matter (i.e. national security) rather than an agency (i.e. RCMP).

5. Dissemination of Information

I have already noted that the RCMP's role in gathering information and intelligence relating to national security is relevant to my mandate. I am also interested in the management and dissemination of such information. Most, if not all, national security information and intelligence is stored on the Secure Criminal Investigations System (SCIS) database. Information on SCIS has been classified by the RCMP as "top secret". We are advised that access is restricted to those personnel with the appropriate security clearance and a need to access such information to perform their duties. Information on SCIS is also disseminated to other agencies, both domestic and foreign. Formal requests for information are generally coordinated by Headquarters, but more informal exchanges at the field officer level also take place. As set out in the RCMP Paper, there are a limited number of formal policies and guidelines governing the intake and dissemination of such information. While the RCMP has broad guidelines and policies requiring, for example, respect for the *Charter of Rights and Freedoms*, the *Privacy Act* and democratic principles, there are no detailed guidelines governing when and under what circumstances information is to be provided to others. Decisions about what information to share with whom is sometimes left to the discretion of a field officer employing police judgment in the context of broad guidelines.

In addition, there are few written agreements between the RCMP and other agencies setting out the terms and conditions of information exchanges. Instead such exchanges generally take place on an informal basis and are based on unwritten protocols and common understandings. Most of these protocols and understandings are not recorded in

written form by the RCMP. The informal nature of such information exchanges and the lack of detailed guidelines may have implications both for the need for, and the form of review, and I invite submissions in this regard. One exception is a November 2003 Ministerial Directive that requires the Minister to approve of formal or informal agreements or other forms of cooperation between the RCMP and foreign intelligence agencies such as the CIA. This Directive does not, however, apply to RCMP interaction with foreign police forces such as the FBI.

6. Accountability Mechanisms

It is also important to my mandate to consider the accountability mechanisms to which the RCMP is currently subject. One of the critical issues in this Inquiry is whether the existing review mechanisms are sufficient. Current mechanisms include ministerial oversight, review by the courts, and enforcement of internal policies and codes of conduct by senior RCMP officers. RCMP activities are also reviewed by the Commission for Public Complaints Against the RCMP. All of these mechanisms are discussed in the RCMP Paper as well as the paper on Domestic Models of Review of Police Forces. I highlight two points that are particularly relevant. The first relates to the RCMP's accountability to the government. The *RCMP Act* provides that the Force is under the control of the Commissioner of the RCMP, under the direction of the Solicitor General of Canada (the Minister of Public Safety and Emergency Preparedness). The relationship between the RCMP and the Solicitor General is subject to the principle of police independence, which is discussed in some detail in the Police Independence Paper. In general terms, police independence provides that a police force is to be independent of government, at least in respect of law enforcement, investigations and prosecution matters. This involves limits on the degree to which government may interfere with the actions of the RCMP. As a result, directives from the Solicitor General tend to be restricted to broad policy issues. The implications of police independence for a review mechanism are of obvious interest to me.

The second point I wish to highlight relates to review by the courts. The criminal context of the RCMP's work means that the possibility of review by the courts exists as an

important potential review and accountability mechanism. However, I note that few of the RCMP's national security investigations have, to this point, resulted in prosecutions before a court. Given the emphasis on crime prevention in the national security context, it is unlikely that most such activities will be subject to frequent scrutiny by the courts in the future. When one considers as well the "top secret" nature of much national security work, it may be that many of the national security activities of the RCMP will not be subjected to review by any outside entity. I invite submissions about the implications, if any, of these matters for the consideration of the appropriate review mechanism for the RCMP.

III. Review Mechanisms

The determination of what is the most appropriate review mechanism for the RCMP in its national security activities will require the identification and balancing of a number of objectives. I set out below my general observations regarding three objectives that it seems to me are applicable to that determination. I have identified these as: (1) maintaining national security; (2) protecting rights and freedoms; and (3) ensuring accountability. I welcome public submissions about these objectives and any others considered to be important. More detailed discussions of both the facts and issues identified in this section are contained in the RCMP Paper, the Rights and Freedoms Paper, the Statutory Framework Paper, the Police Independence Paper, the Accountability Paper, and the Security Intelligence Accountability Paper.

1. Maintaining National Security

It is clear that the design and operation of a review process for the RCMP's national security activities must have regard to Canada's legitimate national security interests. There is no single definition of what constitutes national security. However, in very broad terms, maintaining the internal and external security of the nation against both foreign and domestic threats is generally considered to fall within the concept of "national security".

Threats to the security of Canada are defined in section 2 of the *CSIS Act* as:

- espionage or sabotage that is against Canada or is detrimental to the interests of Canada,

- foreign-influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

- activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, or religious or ideological objective within Canada or a foreign state, and

- activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

The RCMP's national security activities extend to these threats to the security of Canada by virtue of section 6 of the *Security Offences Act*, which provides that RCMP officers "have the primary responsibility to perform the duties that are assigned to police officers" in relation to offences that arise "out of conduct constituting a threat to the security of Canada within the meaning of the *Canadian Security Intelligence Act*", or if "the victim of the alleged offence is an Internationally Protected Person within the meaning of section 2 of the *Criminal Code*".

The duties of the RCMP include "the apprehension of the commission" of national security offences. The *Anti-terrorism Act*, an important piece of post 9/11 legislation, substantially amended the *Criminal Code*, the *Security of Information Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* with respect to both terrorism-related offences, and new procedures (such as preventive detention and special

electronic surveillance provisions). These legislative changes have expanded the scope of the national security mandate of the RCMP.

The nature of national security activities clearly presents special challenges in the consideration of an appropriate review mechanism. For example, a review process should have regard to the following issues:

- protecting relationships with other police and security intelligence services in Canada and elsewhere. This includes ensuring that caveats (i.e. restrictions on disclosure or dissemination of information) are respected so that information and intelligence exchange is not disrupted;

- protecting international relations;

- protecting human sources of information, or information provided by human sources;

- protecting investigative techniques and operational methods from disclosure where necessary.

Whatever model is chosen, the review mechanism should not itself inappropriately compromise national security. One of the questions therefore is, what form of review mechanism will accommodate the objective of maintaining Canada's legitimate national security interests, while at the same time fulfill the objectives of an effective review process?

2. Protecting Rights and Freedoms

An appropriate model of review should have as one of its objectives the protection of rights and freedoms. Reference should be made to the Rights and Freedoms Paper for a more detailed discussion of these issues. The *Charter of Rights and Freedoms* protects individual rights and freedoms, subject to a proportionality analysis. Federal and

provincial human rights codes protect individuals from discrimination. Federal and provincial statutes such as the *Privacy Act* protect individual privacy in respect of information held by government institutions. I collectively refer to these liberal democratic values as "rights and freedoms".

Some commentators have submitted that counter-terrorism and national security investigations, particularly in the post-9/11 context, pose a greater potential risk to rights and freedoms than traditional criminal investigations. It is argued, for example, that:

1. there is potential for overbroad use of intrusive powers;

2. there is more information sharing with potentially more significant consequences e.g. sharing with foreign governments;

3. the techniques used to collect information are subject to less external scrutiny (judiciary, media, civil society), in part because there are fewer prosecutions;

4. the investigative techniques are more surreptitious, approximating intelligence collection;

5. national security investigations may target legitimate forms of dissent, assembly and other non-criminal activity, thereby threatening freedoms of expression and association;

6. national security investigations may effectively target individuals based on race, religion or ethnicity rather than on the basis of suspected criminal activity;

7. officials may act on information provided by other countries that may have resulted from torture or other prohibited acts, or may provide information to countries that engage in such acts;

8. officials may act on information provided by other countries that may not be reliable or whose reliability will be difficult to determine; and

9. officials may, in order to assist other countries, subject Canadian citizens and residents to surveillance, interrogation or other acts.

It is not possible in this Paper to provide a full discussion of these assertions. I therefore refer the reader to the Rights and Freedoms Paper, and I briefly elaborate on one of the arguments, by way of example. A number of the intervenors in the Factual Inquiry have raised concerns about racial and ethnic profiling in Arab and Muslim communities in the wake of September 11th, submitting that such profiling undermines the liberty, privacy and equality rights of many innocent Canadians. At least in the present context, it is said that there is an additional risk that members of the Arab and Muslim communities, including recent immigrants and non-citizens, may feel reluctant to complain about the conduct of police authorities. However, others have argued that the same points can be made with respect to racial profiling in the context of any other police investigation. One question which then arises is whether the national security activities of the RCMP pose a different risk to rights and freedoms than the RCMP's more traditional policing activities. If so, what is the difference, and what are the implications for the consideration of an appropriate review mechanism?

I am interested in submissions on this question and the many others that arise in the consideration of the role a review mechanism for the RCMP's national security activities should play in the protection of rights and freedoms.

3. Ensuring Accountability

A review mechanism for the RCMP's national security activities must also ensure appropriate accountability. Since accountability can be defined and achieved in different ways, I must consider what the precise accountability goal should be for review of the RCMP's national security activities. I must consider the democratic principle of transparency and openness in particular; and I must also consider how the principle of

police independence affects the discussion. These issues are discussed in more detail in the Accountability Paper and the Police Independence Paper.

In a democratic society, accountability of public officials and institutions is a fundamental value. As discussed in the Accountability Paper, "accountability" has a variety of purposes. Accountability may include control (responsibility for the use of public powers); explanation (providing information); and assurance (providing assurance to the Minister, the government or the public that powers are legitimately exercised, or money well spent). In the context of designing a mechanism to review the RCMP's national security activities, certain questions arise:

Accountability for what?

Accountability may be used in reference to propriety or to efficacy. Propriety refers to compliance with laws and ethical norms, both in relation to ends and means. Accountability for propriety is especially an issue when police powers are not subject to traditional forms of judicial scrutiny – either for reasons of national security, or because they are intelligence directed rather than prosecution directed. Accountability for efficacy tends to focus on the relation of means to given ends: are they efficient and giving value for money?

Accountability to whom?

There are five main bodies for accountability: the executive, judicial and legislative branches of government; public inquiries; and the public. This last form of accountability – the public – may be discharged by the media, through access to information requests, by their own investigations, or the publication of the findings of a review body.

Accountability by whom?

This refers to the specific body that actually conducts a review, which is different from the body to which it reports its conclusions. There may be more than one body. For example, CSIS is accountable through both an Inspector General and an independent review body, SIRC. SIRC reports to the minister (the executive); to Parliament

(legislative), and to the public through the publication of its annual reports. In considering the type of review body, issues arise as to the degree of autonomy or independence required; the skills or expertise required; resources; access to persons and records sufficient for review; the need for the organization being reviewed to maintain the confidence of other organizations with which it interacts; and legitimacy.

Accountability of whom?

The integrated structure of INSETs, IBETs and IIETs may raise jurisdictional concerns, where some of the participants may be members of provincial or municipal police forces, and others will be federal public servants who are not members of the RCMP. Increasing integration with other federal agencies with a national security mandate raises similar issues.

Accountability when?

The question of the timing of accountability is crucial, particularly in sensitive national security matters, and so as not to compromise the principle of police independence. There is a distinction that must be drawn between accountability as oversight and as review. "Oversight" is typically understood to mean supervision, management or control, and may involve a watchdog function over the ongoing activities of an agency. "Review", on the other hand, typically refers to an *ex post facto* process which may involve reports, interviews, audits and evaluations to provide the basis for public judgment on the performance of agencies and officials. Review often connotes an independent assessment of the way an organization has performed, drawing attention to past mistakes and prompting remedial action for the future.

The key questions in this area are: What is the nature of the accountability sought to be achieved, and how does this influence the determination of what is the most appropriate review mechanism? What is the appropriate body to carry out the desired accountability?

(a) Transparency/Openness

An integral element of our democratic system is the assurance, to the greatest extent possible, of openness and transparency in the functioning of public institutions. These concepts are often seen as important elements of accountability. These principles, however, must clearly be balanced when considering accountability in the context of the RCMP's national security activities.

The challenge will always be to design a process that provides public transparency where elements of that review will, of necessity, have to be kept secret. How can transparency best be achieved in a review of the RCMP's national security activities?

(b) Police Independence

It is clear that the principle of police independence must be considered in the design of any review mechanism for the RCMP, which is a law enforcement agency. The Police Independence Paper points out that the extent of police independence from the executive in Canadian law is subject to debate. In its purest form, the principle of police independence includes freedom from governmental direction in law enforcement activities such as criminal investigations, arrests and prosecutions. The principle is designed to protect the criminal process from inappropriate governmental and political interference. There may be a distinction between accountability and answerability, on the one hand, and control and direction on the other. How does the accountability and review focus of an arm's length review mechanism affect concerns about police independence?

There are statutory exceptions to the principle of police independence, even in the criminal process, for cases with national security implications. The *Anti-terrorism Act* requires the approval of the Attorney General of Canada before proceedings for terrorism offences under the *Criminal Code* or *Security of Information Act* are commenced. The Attorney General's consent is also required before the police apply for an investigative hearing or exercise preventive arrest powers, both relevant in the criminal investigation

of terrorism offences. Ministerial Directives issued in November 2003 also provide that the Minister be informed of high profile or controversial national security investigations by the RCMP and also establish some policies to guide such investigations.

The issue with respect to the principle of police independence is how it applies in the context of accountability for the RCMP's national security activities, and how it might influence the design of any proposed review mechanism.

IV. Domestic Models

The Terms of Reference direct me to base my recommendations in part on an examination of domestic review mechanisms. I am also directed to consider how any recommended review mechanism for the RCMP's national security activities might interact with existing review mechanisms.

For these reasons, I have undertaken an examination of the review and accountability mechanisms in place in the Canadian policing and security intelligence fields, including those that apply to the RCMP and other federal agencies engaged in national security activities. I summarize these mechanisms below. More detail can be found in the Review of Police Forces Paper and in the Security Intelligence Accountability Paper. I welcome public submissions on domestic models of review, including commentary on the effectiveness or the instructive value of various features of the models, as well as suggestions as to how any recommended review mechanism might interact with existing mechanisms.

1. Review agencies for police forces

(a) Commission for Public Complaints Against the RCMP

Since 1988, the RCMP has been subject to an independent complaints body called the Commission for Public Complaints Against the RCMP (CPC). Any member of the public who wishes to complain about the conduct of an RCMP member in the

performance of her or his duties can file a complaint with the CPC. In 2002-2003, just under 900 formal complaints were made. While it is the CPC that receives the complaint, the RCMP has the first right to investigate it and/or attempt an informal resolution. It is only if the complainant is dissatisfied with the results of the RCMP investigation, or if the CPC Chair believes that it is in the public interest to do so at the outset, that the CPC conducts its own investigation, attempts an informal resolution and/or conducts a hearing.

The CPC can also initiate its own complaints and did so with respect to Maher Arar. However, the CPC does not have an audit-like power to review RCMP activities beyond the scope of a complaint. The Commission also has no power to subpoena documents; to make binding conclusions or award remedies to a complainant. It can make findings and recommendations only.

The CPC receives a wide range of complaints. There is presently no distinction made in the legislation for the processing of complaints that relate to national security activities of the RCMP, although the CPC does have a statutory power to order that a hearing be held in private in certain circumstances, including preventing the disclosure of information that could be injurious to law enforcement, to the defence of Canada, or to the detection, prevention or suppression of subversive or hostile activities. CPC proceedings are also subject to the *Canada Evidence Act*, which contains procedures for "sensitive" and "potentially injurious" information.

When the CPC is conducting an investigation into a complaint, whether filed by an individual or filed on its own initiative, the RCMP is obliged to turn over all relevant documents, subject to privileges such as solicitor-client and confidential informant privileges. However, it is a matter of some debate to what extent the RCMP must turn over documentation relating to national security investigations, which is often classified as secret.

The Chair of the CPC submits annual reports to the Minister, which are then laid before both Parliament. The present budget of the CPC is just under $5 million. Its members

are appointed by the federal Cabinet for a renewable five-year term during which they can only be removed for cause.

(b) Provincial/territorial models

The territories are policed by the RCMP, which is subject to the CPC. With the exception of PEI, all provinces have some form of complaint-based review agency for their provincial and/or municipal police forces. These agencies have many variations and commonalities among them, and I encourage the reader to consult the Review of Police Forces Paper for a detailed discussion and comparison. For the purposes of this Consultation Paper, I believe it important to highlight certain features of these models, in particular as they resemble or differ from the CPC.

Like the CPC, most of the review agencies generally do not conduct, or lack the authority to conduct the initial investigation of a complaint. Only Québec, Manitoba and New Brunswick have such authority; and Québec and Manitoba preclude their respective police forces from involvement in the complaint investigations. Québec's Police Ethics Commission has the power of entry into police premises and the power to require the production of documents. Manitoba's Law Enforcement Review Agency has broad search powers as well. In all of the other provinces (i.e. Newfoundland, Nova Scotia, Ontario, Saskatchewan, Alberta and British Columbia), the review agencies have varying authorities to conduct a subsequent investigation, assume carriage of the investigation, or receive ongoing reports about the investigation. In some cases, the right to conduct a subsequent investigation requires an express appeal or request by the complainant. In some provinces, third parties can make complaints but in others the consent of the person directly affected is required.

Like the CPC, none of the review agencies has a wide-ranging audit-like power to review the activities of the police forces, although some have limited powers to commence investigations either on their own initiative or at the request of the respective Ministers. In most provinces, the provincial cabinet appoints members to the review agencies for renewable terms. In British Columbia however, the commissioner is appointed for a non-

renewable 6-year term by a special committee of the legislative assembly and can only be removed by a two-thirds vote of that committee.

None of the governing statutes provide for special processes, or special document production powers, in the event that a complaint addresses police activities having a national security element. To step back, while the RCMP has "primary responsibility" for the investigation of national security offences, provincial and municipal police forces still investigate crimes that may have or may eventually be identified as having national security implications. As well, some provincial and municipal police forces participate directly with the RCMP in national security investigations, or have their own anti-terrorism units (eg. the Ontario Provincial Police). It is therefore possible that the provincial review agencies could be responsible for investigating complaints that have a national security aspect, yet no procedures or other mechanisms are set out in the governing statutes. This said, the *Canada Evidence Act* could still be invoked to provide for the handling of "sensitive" and "potentially injurious" information.

I also note that none of the review agencies appears to have a statutory mechanism to address jurisdictional or operational difficulties that might arise when complaints are made about joint activities among police forces, whether at municipal, provincial or federal levels.

In other words, even though the provinces have police forces that appear to be engaged to varying degrees in national security activities, none of the review agencies appears to offer any specific instruction on how such activities should be reviewed, or how the challenges of inter-jurisdictional cooperation might be addressed. Nonetheless, some of the review mechanisms do have features that differ from the CPC and that are therefore useful to note. As with other sections of this Paper, I welcome observations from the public as to features or experiences of the provincial review agencies that may be of some instruction to me in fulfilling my mandate.

(c) Military Police Complaints Commission

The Military Police Complaints Commission (MPCC) is modelled after the Commission for Public Complaints Against the RCMP, and has many of the common features of a complaints-based review model. However, the MPCC appears to offer the only domestic example of a review body that has jurisdiction only over some, and not all, of a police force's activities. The MPCC's jurisdiction is limited to the review of complaints about the conduct of a member of the Military Police in the performance of her or his *policing duties*, as determined in regulations to the *National Defence Act*.

Duties or functions performed by military police that relate to administration, training, or "military operations that result from established custom or practice" are exempted from review. The latter exemption could include functions related to the traditional combat role of military police, including traffic control in a military theatre, or even the handling of POWs.

A complaint cannot be reviewed by the MPCC if the military police officer was engaged in a "non-policing" function.

2. Review agencies for security intelligence

For some time Canada has had a different form and degree of review for security intelligence agencies. These agencies are reviewed by bodies that have significantly different review functions than the models of police review discussed above.

For example, CSIS is reviewed by an appointed committee of Privy Councillors called the Security Intelligence Review Committee (SIRC) that has the mandate not only to investigate complaints, but also to "review generally the performance by (CSIS) of its duties and functions". SIRC therefore regularly initiates reviews of CSIS activities for compliance with law, including the limitations on CSIS activities contained in the *CSIS Act*; with ministerial directives; and with operational policies. SIRC has full access to all CSIS documentation, including documents conventionally covered by privilege, with the

exception of those covered by Cabinet privilege. SIRC does not have the authority to make binding conclusions, but its findings and recommendations are set forth in a public report to the Minister. The report is then laid before Parliament, thereby providing a form of legislative accountability for CSIS.

CSIS is also reviewed by an Inspector General, who reports to the Minister. The Inspector General is mandated to monitor compliance with operational policies, and to review CSIS operational activities. The Inspector General must also regularly certify to the Minister that she is satisfied with CSIS reports of operational activities. In particular, she must certify that CSIS has complied with the *CSIS Act* and with ministerial directions, and that there has been no unreasonable or unnecessary exercise of its powers. Like SIRC, the Inspector General has full access to CSIS documentation, with the exception of documents covered by Cabinet privilege.

The CSE is reviewed by the CSE Commissioner, who by statute must be a retired or supernumerary judge. Like SIRC, the CSE Commissioner has both a complaint-investigation role, and a broader review mandate that includes the authority to conduct investigations on his own initiative. The CSE Commissioner monitors the CSE's compliance with the law, including the prescribed limitations on CSE activities; as well as its compliance with ministerial directives and operational policies. The CSE Commissioner has the same power to compel documents as SIRC and the CSIS Inspector General; and also issues non-binding conclusions. Findings and recommendations are set out in both confidential and public versions of annual reports to the Minister. A copy of the public report is then laid before Parliament.

3. Other accountability mechanisms

In addition to the agencies described above, there are a number of other institutions and forces that play an important role in holding Canada's police forces and security intelligence agencies accountable.

For example, when investigations lead to prosecutions, law enforcement agencies are subject to judicial scrutiny. Courts will consider challenges to the legality and constitutionality of evidence sought to be introduced into proceedings. Courts review relevant information collected by a police force and introduced as evidence in a criminal proceeding to ensure that it complies with constitutional and legal standards. Courts also review information collected by police during their investigations. For example, they review applications for warrants; and since the enactment of the *Anti-terrorism Act*, they review applications for investigative hearings and for recognizance with conditions. These latter applications also require the prior consent of the Attorney General, which amounts to an additional check on police powers.

Since CSIS is not a law enforcement agency, it does not collect information with a view to prosecution, and as a result its techniques are not subject as frequently to the possibility of judicial scrutiny. However, its investigative methods and choices are subject to numerous statutory authorization processes; and it is required to seek warrants from the court for certain investigative procedures.

The CSE, while not subject to court review of its intelligence collection, is subject to ministerial authorization processes for certain activities, as set out in its governing statute.

In addition, all law enforcement and security intelligence agencies in Canada are subject to the *Charter*, which is enforced by the courts.

There are various forms of legislative accountability as well. At the federal level, for example, a number of committees provide a form of parliamentary review and accountability for agencies, departments and organizations operating in the national security field. These include the House of Commons Subcommittee on National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness; and the Standing Senate Committee on National Security and Defence. The federal government also recently proposed the creation of a new National Security Committee of Parliamentarians, which would include members of both the Senate and the House of Commons. An Interim Committee on National Security is currently working on

recommendations on the composition and mandate of the proposed Committee of Parliamentarians.

Accountability to Parliament and to provincial legislatures is also provided through a number of other mechanisms. For example, at the federal level, the Auditor General plays an important role in monitoring the expenditures and activities of federal agencies. Indeed the Auditor General recently undertook a substantial review of the national security activities of numerous federal agencies and organizations, including the RCMP. The Auditor General tables her reports in Parliament.

In addition, all law enforcement and security intelligence agencies in Canada are subject to statutory human rights codes; and most law enforcement agencies, and all security intelligence agencies must comply with access-to-information and privacy legislation, subject to law enforcement and national security exemptions. The agencies and offices that are assigned the mandate of enforcing these statutes typically have reporting obligations to Parliament.

All of these mechanisms combine to afford the Canadian public access to information about the activities of Canada's law enforcement and security intelligence agencies. The media, advocacy groups and individuals use this information to create awareness, apply pressure for change, and propose alternatives to the status quo.

As I stated, I welcome public observations on the models of review and accountability described in this section.

V. International Models

The Terms of Reference direct me to base my recommendations, in part, on an examination of review mechanisms found in other countries. As a first step I have selected eight countries in which it appears that the institutional arrangements for national security activities and their review or oversight may have instructive features for Canada.

Given the terms of my mandate, I am particularly interested in examining review models in countries in which most of the following are present:

- the liberal democratic traditions and institutions are comparable to Canada's;
- the police engage in national security activities;
- there has been an increase in the national security activities of the police since 9/11;
- there is a federal structure, and the national police interact or cooperate with the provincial or state police;
- there is interaction between the police and civilian agencies whose activities relate to national security intelligence; and/or
- there has been some discussion of, or the establishment of, new or altered review structures to address an increase in national security activities of the police.

Many countries are presently addressing the challenges of maintaining national security, protecting rights and liberties and ensuring accountability; and much can be learned from comparative experience. The eight countries that I have selected are: Australia, Belgium, Germany, New Zealand, Norway, Sweden, the United Kingdom and the United States. The Commission has already conducted preliminary research on the review and oversight mechanisms for the police and security intelligence agencies in each of these countries. The information collected to date is drawn from publicly available reports, research and articles; and is set out in the International Models Paper. As I stated at the beginning of this Paper, our research on international models continues. For now, I make some general observations about the national security landscape and the review approaches taken in the countries selected; and I highlight certain features of the various models.

1. Australia

Australia has recently introduced a number of legislative and other national security measures. These include the creation of new terrorism offences, for which the Australian Federal Police (AFP) have enforcement responsibility. The AFP have units that are specifically responsible for national security matters. These units work in close cooperation with the two civilian agencies that are responsible for domestic and foreign security intelligence. It may be useful to learn more about the AFP's national security activities, including their interaction with Australia's intelligence agencies, with state and local police forces, and with foreign agencies.

I am also interested in the review mechanisms in place for Australia's police and security intelligence agencies, in particular because it is a federal state. I note that the police and security intelligence agencies appear to be subject to separate review and oversight mechanisms, with no jurisdictional overlap; and that the Australian security intelligence agencies, but not the police, are subject to scrutiny by an Inspector General and a Parliamentary Joint Committee.

I also note that the AFP are subject to external review by the Commonwealth Ombudsman; and that in its 2002-2003 Annual Report, the Ombudsman stated that the expanded powers for "counter-terrorism activities" were an emerging review issue. For example, he had received complaints about search warrants issued in counter-terrorism investigations. The Ombudsman further stated that he would "continue to monitor conduct issues to ensure that (the AFP's) increased powers do not lead to an inappropriate erosion of people's rights". It may be useful to learn more about the Ombudsman's recent review activity in these matters.

2. Belgium

Belgium's national police force has several units dedicated to national security activities. While the number of staff engaged in such activities appears to be relatively small, the review models in place in Belgium may be of some interest.

Belgium's Committee P is a committee that reports to Belgium's legislature, but is not comprised of legislators. It has jurisdiction over the national and local police forces, and would appear to have a wide-reaching review function. It would appear to review matters ranging from alleged conditions in holding cells, to alleged thefts by police officers, to allegations of racism and discrimination, to warrant authorizations, to the propriety and efficiency of police integration with other domestic and international authorities.

There also appear to be mechanisms in place to govern interaction between Committee P and Committee I, which reviews the activities of Belgium's intelligence organizations.

It will be useful to examine these review functions and structures further, to determine whether they may provide useful examples for Canada.

3. Germany

Germany has recently undertaken several national security measures, including amendments to its criminal code, and changes to its information sharing structures. Germany's federal police force, known as the BKA, engages in conventional law enforcement activities as well as national security activities, including the collection of security intelligence.

As with the other countries in which the police forces are engaged in national security activities, it will be useful to inquire further into the operational division of enforcement and intelligence collection activities; the interaction of the BKA with state police forces and with domestic and foreign intelligence and other agencies; and the review mechanisms in place for the police and intelligence agencies.

Since Germany is a federal state, its review apparatus may be of particular use in addressing questions of how a review mechanism for the federal police force interacts with other federal and state review authorities.

4. New Zealand

New Zealand has also recently enacted new legislative and other national security measures, including measures that expanded police powers, created special police teams dedicated to national security activities, and increased international cooperation.

New Zealand appears to have separate mechanisms for the review of police activities and the review of intelligence activities. The Inspector General of Intelligence and Security and the Commissioner of Security Warrants are the principal review mechanisms for the security intelligence agencies. The Police Complaints Authority is the principal review mechanism for the national police, and draft legislation was recently introduced to increase its independence.

5. Norway

Norway's national police force has a civilian arm called the Police Security Service. It has a separate statutory mandate, and carries out domestic security intelligence collection and certain national security law enforcement activities. The establishment of a statutory mandate for the Police Security Service was the result of an extensive review by a commission of inquiry in 1996.

It will be useful to examine precisely how policing and intelligence-collection activities are divided between the Police Security Service and the balance of the national police force; and to examine the extent of interaction between them, and between the Police Security Service and other domestic and international agencies. This will assist in examining the implications that the police force's division of functions has for its review mechanisms.

Norway appears to have a review system in which jurisdiction is defined, at least in part, by the nature of the impugned activity. For example, the Committee for Oversight of the Intelligence, Surveillance and Security Services has jurisdiction over all intelligence-collection activity, with the possible exception of foreign intelligence, regardless of

which organization carries it out. The Committee engages in investigations of complaints, as well as statutorily required inspections and inquiries launched on its own initiative including into matters that receive public criticism. The review committee has security clearances and wide powers of access to relevant documents. It is directed by statute to ascertain and prevent injustice to any person and ensure that security functions are required and legal while considering national security and relations with foreign countries. The review agency is appointed by the legislature for renewable five year terms.

This would appear to be a rare arrangement for review, inasmuch as the Committee has jurisdiction over an activity as opposed to a specific agency; and it may therefore provide a highly useful case study. I would like to inquire further into this arrangement, to see how it has operated in practice, and to identify any difficulties it may have encountered, such as threshold challenges to jurisdiction.

6. Sweden

Like Norway, Sweden's national police force includes a Security Service which is engaged in security intelligence collection and national security enforcement activities. However, unlike Norway, the police Security Service is comprised of regular police officers. Its mandate is set out in an ordinance..

It will be useful to inquire into the separation of duties between the Swedish police's Security Service and its regular members; and to consider the extent of interaction and overlap of duties.

In addition, given that Sweden's national police force is engaged both in conventional law enforcement activities and national security activities, it may be particularly instructive to inquire further into the review mechanisms to which the police are subject. I note that Sweden also has a Records Board, which monitors Security Service compliance with laws governing the collection, retention and disclosure of citizens' personal information.

Sweden's review model for a police force's national security activities would therefore appear to have certain features that are novel to the Canadian context and which may merit further study.

7. The United Kingdom

The United Kingdom has enacted or amended a number of pieces of legislation in recent years that affect its national security apparatus, including the powers of its police forces. There is no national police force of general application in the United Kingdom, but the local and regional forces engage in national security activities, including intelligence collection, through divisions of the police called Special Branches, and through anti-terrorism units within some of each of the police forces. I am interested in examining the scope of activity of the Special Branches and the anti-terrorism units, including the extent of their interaction with regular police forces, with foreign agencies, and with the UK's intelligence agencies: MI-5 (domestic), MI-6 (foreign) and the Government Communications Headquarters (signals intelligence).

I am also interested in examining the UK's review mechanisms in detail. I note that a new Independent Police Complaints Commission has just been established, as well as a new Police Ombudsman for Northern Ireland. Neither appears to make a jurisdictional distinction between conventional policing activities and national security activities of a police force.

In addition, the UK has review mechanisms in place with jurisdiction over certain activities of both the police and intelligence agencies: the Interception of Communications Commissioner; and the Investigatory Powers Tribunal. It may be useful to examine how these review authorities operate, and how they interact with the other review and oversight structures in place for police and intelligence services.

It may also be useful to review how the doctrine of police independence has been interpreted in the UK context.

8. United States

Like some of the other countries selected, the constitutional structures in place in the United States differ significantly from those in place in Canada, such that the review and oversight mechanisms may offer only limited instruction. Nevertheless, the United States may have some use as a case study.

For example, the United States offers an example of a federal police force engaged in national security activities (the FBI), including intelligence collection and enforcement of national security offences. It also offers an example of a country in which numerous national security measures have been taken in the post 9/11 era, and in which at least one additional review power appears to have been added as a consequence of these new measures. That is, the PATRIOT Act created an express responsibility in the Department of Justice's Office of the Inspector General (OIG), which has review jurisdiction over a number of federal agencies including the FBI, to review claims of civil rights violations by the FBI.

The OIG has carried out these reviews in the context of its broader review mandate over the FBI. It can select what complaints it will investigate and can refer others to an Office of Professional Responsibility. Its mandate appears to include review of a wide range of activities, from the investigation of allegations of false travel claims; to allegations of improper database access; to complaints of illegal detentions, arrests and searches; to a review of FBI counter-intelligence programs. The OIG can also be requested by Congress to conduct investigations into matters of both efficacy and propriety.

The FBI is also subject to a Congressional oversight committee, as are the Central Intelligence Agency (CIA) and the National Security Agency (NSA). It may be useful to inquire further into the functions and activities of these committees.

The United States is also a federal state, and it may be interesting to inquire into whether the review structures for the FBI include any mechanisms to address the FBI's interaction with state police forces, as well as other domestic and international agencies. I also note

that the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission") recently recommended the establishment of a board within the executive branch to oversee adherence to the Commission's guidelines and to the government's commitment to civil liberties. This recommendation led to an executive order creating the President's Board on Safeguarding Civil Liberties. It may be interesting to review both the recommendation and the operation of the Board.

9. Next Steps

The Commission will continue its examination of appropriate international comparisons, including a review of available literature. The Commission will also solicit information from those directly involved in the relevant agencies and institutions, both in writing and, possibly in some instances, by interview. Hopefully we will be able to obtain assessments about the efficacy of the systems being examined.

VI. Options

One of the principal objectives of this Consultation Paper is to foster a public dialogue about options for a review mechanism for the national security activities of the RCMP. Now that I have set out the RCMP's national security activities in some detail, and begun my examination of domestic and international review models, I think it useful to provide a preliminary discussion of some options for a review mechanism.

This section is intended to provide a non-exhaustive, preliminary list of options. I look forward to the Commission's further examination of international models, which may reveal other options; and I welcome public suggestions for other possibilities, or for variations of the models as described below. I also welcome submissions on the question of whether a new review mechanism is warranted, whether the proposed models fall within my mandate, and on the numerous questions that are raised by any consideration of these models. I have set out some of these questions below, but I would also ask the public to consider the "List of Issues" which is available on the Commission's website. The following questions from the List of Issues are particularly germane to this section:

If I were to recommend a new review mechanism,

a. over what activities/entities should it have jurisdiction?

b. what functions should it have?

c. what authority/remedial power should it have?

d. what should its processes be?

e. to whom should it report?

f. to what extent should its reporting be public or classified?

1. Option A: Status quo

As noted in the RCMP Paper, the RCMP already has numerous accountability and review structures. For example, it has a governing statute, a code of conduct, internal policies, ministerial directives, and a supervisory hierarchy. It is subject to scrutiny by independent agencies, including the Commission for Public Complaints and the Auditor General. It must comply with the *Privacy Act*, the *Access to Information Act*, the *Canadian Human Rights Act*, the *Charter of Rights and Freedoms* and the dictates of the rule of law. The evidence that the RCMP collects and attempts to use in prosecutions is subject to judicial scrutiny.

A question of first order in the Policy Review is therefore whether current review and accountability mechanisms already constitute an appropriate check on the RCMP's national security activities, such that no new or varied "independent arm's length review mechanism" should be recommended.

I am interested in the public's submissions as to whether and how current review mechanisms are sufficient or insufficient. In other words, what should be the objectives of an arm's length review mechanism for RCMP activities with respect to national security? How do current mechanisms meet or fail to meet these objectives?

2. Option B: Enhanced powers for the Commission for Public Complaints Against the RCMP

In making recommendations for an independent arm's length review mechanism for RCMP activities with respect to national security, I must consider in detail the independent arm's length review mechanism that already exists: the Commission for Public Complaints Against the RCMP. I must consider whether it is structured, mandated and equipped to fulfill the objectives of a review mechanism for the RCMP's national security activities. I must also consider whether it is feasible to separate the RCMP's national security functions from its other law enforcement functions.

If I were to conclude that the CPC is, in one or more ways, inadequately-structured for the task, one option is that I recommend that it be granted new powers, and/or that it be structured differently. For instance, I could draw from the example of SIRC, and possibly from certain international models such as Belgium's Committee P and the Inspector General of the FBI, to recommend that the CPC have the authority to conduct audits, regardless of whether a complaint is filed; the authority to review for RCMP compliance with directives, policies and legal and constitutional rules; and that it have the power to compel the production of RCMP documents.

Many questions are raised by this option. For example: Why might the CPC require different powers or structures than it already has? What precise changes would be necessary? What would the CPC's new mandate be? Would it include review for effectiveness and/or compliance with directives and policies? Could an enhancement of CPC powers be reconciled with the doctrine of police independence? Would an enhancement of powers be limited to review of the RCMP's national security activities? If so, how would these be defined? Either way, would the CPC's review jurisdiction become so wide-ranging that its effectiveness would be diminished? How would the CPC address jurisdictional questions raised by the provincial-federal-international composition of the RCMP's integrated enforcement teams such as INSETs and IBETs? How would other Canadian and international agencies react to a CPC with broader

powers? Would the reporting structures of the CPC change? What remedial powers would it have?

I am interested in submissions from the public on all of these questions, as well as any other questions, challenges or advantages raised by this option.

3. Option C: Creation of a new review mechanism for RCMP national security activities

Another option is that I recommend the creation of a new agency that would have review jurisdiction over the RCMP's national security activities. It could have structures, functions and powers akin to bodies such as SIRC, the CSE Commissioner, the CSIS Inspector General, or certain international models; and it would co-exist with the CPC, which would have jurisdiction over the remainder of the RCMP's activities.

This option could include recommendations that there be certain prerequisite criteria for the appointees to the new agency; that such appointees and the agency have certain security compliance requirements; that the agency have a mandate to review not only for propriety, but for effectiveness; that it have the power to conduct audits and to compel production of documents; and/or that it have the power to make binding conclusions.

Inherent in any such recommendation would be a conclusion that it is more effective or more desirable to have the national security activities of the RCMP reviewed by a body separate from the Commission for Public Complaints, one with a different mandate, different composition, and more substantial review powers. I must also consider why such substantial review powers have typically been reserved for pure intelligence agencies, such as CSIS and the CSE; and why they have not often been accorded to agencies that review police forces. Can it be said that the RCMP's activities have changed sufficiently that a shift in conventional review precepts may be in order or that conventional models are otherwise no longer appropriate? And what instruction can I draw from the example of review models in other jurisdictions that appear to have SIRC-like authority over the national police force?

A number of other questions come to mind. Would it be workable to have one agency review the RCMP's national security activities, while another (the CPC) reviews the balance of the RCMP's activities? How would the RCMP's national security activities be defined? Would there be some measure of overlapping authority or cooperation between the new body and existing agencies? Would such parcelling of jurisdiction be further complicated by the integration of RCMP national security activities with other provincial, federal and international police forces and agencies? Would the powers of such a body amount to executive "oversight" of a police force? Would the agency provide Parliamentary accountability (as SIRC and the CSE Commissioner do), or ministerial accountability (as the CSIS Inspector General does)? Whether categorized as oversight or review, could the creation of such powers be reconciled with the doctrine of police independence? What precisely would be the mandate, function, powers, structures, etc.?

I am interested in public submissions on these questions, as well as any other questions, challenges or advantages raised by these options.

4. Option D: SIRC common to RCMP and CSIS

Another possibility is that I recommend that SIRC be responsible for review of the RCMP's national security activities. In other words, SIRC would have dual jurisdiction over CSIS and a portion of the RCMP's activities.

As with options B and C, this option presupposes a conclusion that current review mechanisms, including the Commission for Public Complaints and the courts, are in one or more ways insufficient; and that review of the RCMP's national security activities should be placed with a different body.

This option also raises questions similar to those raised by options B and C. Is it appropriate to subject certain police force activities to the degree of review to which CSIS is subject? Why or why not? Would it be workable to grant to SIRC the jurisdiction to review the RCMP's national security activities, while leaving the balance

of the RCMP's activities to the Commission for Public Complaints? How would the RCMP's national security activities be defined? Would there be some measure of overlapping authority or cooperation between SIRC and the CPC? Would such parcelling of jurisdiction be further complicated by the integration of RCMP national security activities with other provincial, federal and international police forces and agencies? Would this option at least solve any review difficulties posed by the national security cooperation of CSIS and RCMP officers? Could the review by SIRC of RCMP national security activities co-exist with the doctrine of police independence? Would SIRC have different reporting structures or other functions and powers depending on whether it was RCMP or CSIS activities that it was reviewing? How would expanded responsibility affect SIRC's mandate with respect to CSIS?

As with the other options, I am interested in public submissions on these questions, as well as any other questions, challenges or advantages raised by this option.

5. Option E: SIRC-model common to all federally-regulated national security operations

One way to solve the challenges posed by the integration of the RCMP's national security activities with other federal agencies and departments (such as CSIS, CSE, CIC and CBSA) would be to establish a review mechanism with jurisdiction over the national security activities of all federally-regulated agencies and departments. One of the McDonald Commission's recommendations was that a single agency review the legality and propriety of covert intelligence gathering by all non-police agencies of the federal government. To establish such an authority, either the jurisdiction of an existing body such as SIRC could be substantially expanded; or a new body could be created. Drawing from international experience in the United Kingdom and Norway, such a review agency could have jurisdiction over certain activities, such as electronic surveillance or intelligence gathering, no matter which organization conducts the activity.

Again, a number of questions immediately come to mind. Would such a body replace SIRC, the CSIS Inspector General and the CSE Commissioner? Would it replace other

review structures such as certain functions of the Auditor General? Would it have concurrent or overlapping jurisdiction with these and other review structures, such as the CPC, and the many administrative tribunals that have jurisdiction over federally-regulated entities? How would the national security activities of all of the subject agencies and bodies be defined? Would the military's national security activities, or some aspect of them, be included? What would be the implications of having a review body that would cross ministerial lines within the federal government? Would this agency review for effectiveness and propriety of national security operations? Would this option go further than the others in addressing the question of provincial-federal-international integration in RCMP activities such as INSETs, IBETs and IIETs?

I am interested in public views on these questions, as well as any others posed by this option.

6. Option F: Parliamentary review/oversight

Another possibility is that any identified gap in current review structures could be filled by a parliamentary committee with a mandate to review or oversee the national security activities of the RCMP. Such a committee could have the mandate and structure that the government may propose for the National Security Committee of Parliamentarians, or it could constitute some variation thereof. Many of the countries that the Commission is examining also offer models of parliamentary review and oversight.

I must bear the Terms of Reference in mind when discussing such an option. How would such a recommendation correspond with my mandate to make recommendations that I consider advisable on an independent, arm's length review mechanism? If I were to make such a recommendation, would it be additional to other recommendations? Is it possible that a parliamentary committee would review the efficacy of operations while other review bodies are concerned with propriety?

I look forward to the public's views on these and other questions raised by this option.

7. Option G: Other models and variations

As I have stated, I view the above list of options to be non-exhaustive and preliminary. I am interested in suggestions for alternative models; for variations of the above-described models; and for review features that might form part of any ultimate recommendation. Suggestions for various review features might vary from augmented statutory or regulatory requirements, such as those that govern CSIS investigatory activities; to the establishment of a special committee or function to review for propriety; to the formulation of precise mandates to review activities such as information-sharing; to the creation of mechanisms that will overcome specific jurisdictional hurdles; to completely novel review features, such as a focus on a specific activity instead of an agency.

In other words, I am interested in receiving all manner of observations and suggestions that might assist me in satisfying my recommendation mandate.

APPENDIX A
LIST OF ACRONYMS

AFP	Australian Federal Police
FBI	(US) Federal Bureau of Investigation
BKA	Bundeskriminalamt (Germany's federal police force)
CBSA	Canada Border Services Agency
CIA	(US) Central Intelligence Agency
CIC	Citizenship and Immigration Canada
CPC	Commission for Public Complaints Against the RCMP
CSE	Communications Security Establishment
CSIS	Canadian Security Intelligence Service
DND	Department of National Defence
FAC	Foreign Affairs Canada
IBETs	Integrated Border Enforcement Teams
IIETs	Integrated Immigration Enforcement Teams
INSETs	Integrated National Security Enforcement Teams
ITAC	Integrated Threat Assessment Centre
FinTRAC	Financial Transactions and Reports Analysis Centre of Canada
MOU	Memorandum of Understanding
MPCC	Military Police Complaints Commission
NSA	(US) National Security Agency
NSIS	National Security Investigations Section (of the RCMP)
OIG	(US) Office of the Inspector General
PSEPC	Public Safety and Emergency Preparedness Canada
RCMP	Royal Canadian Mounted Police
SCIS	Secure Criminal Investigations System (of the RCMP)
SIRC	Security Intelligence Review Committee

APPENDIX B
LIST OF BACKGROUND PAPERS AND OTHER REFERENCES

Background papers:

- The RCMP and National Security
- Statutory Framework for the RCMP's National Security Activities
- National Security and Rights and Freedoms
- Accountability and Transparency
- Police Independence (see also the paper listed under Other References below)
- Domestic Models of Review of Police Forces
- Accountability of Security Intelligence in Canada
- International Models of Review and Oversight of Police Forces and Security Intelligence Agencies

Other References:

"The Legislative and Organizational Framework for the National Security Environment in Canada", Exhibit 2 in the Factual Inquiry

K. Roach, "Four Models of Police-Government Relationships", paper presented to Ipperwash Inquiry / Osgoode Hall Law School Symposium on Police / Government Relations, June 29, 2004 (http://www.ipperwashinquiry.ca/policy_part/pdf/Roach.pdf)

Also referred to in this Paper:

"Securing an Open Society: Canada's National Security Policy" (http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf)

"A National Security Committee of Parliamentarians: A Consultation Paper to Help Inform the Creation of a Committee of Parliamentarians to Review National Security", (http://www.psepc-sppcc.gc.ca/publications/national_security/nat_sec_cmte_e.asp)

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar
Policy Review

Amendments to Consultation Paper
December 14, 2004

Following are amendments that have been made to the Consultation Paper, since its publication in October 2004. The amendments are highlighted below in bold, and unless otherwise stated, were made in both the French and English versions of the Paper.

Page	Amendment
8	"...the **Communications** Security Establishment..." (Changed in english version only)
25	"SIRC does not have the authority to make binding conclusions, but its findings and recommendations are set forth **in a public annual report to the Minister. The report** is then laid before Parliament, thereby providing a form of legislative accountability for CSIS."
29 - 30	In first paragraph under "Belgium" section, **deletion of phrase** "...and while Belgium's criminal code does not include any terrorism-specific offences..."
32	In first paragraph under "Sweden" section, **deletion of phrase** "...and does not appear to have a separate statutory mandate". Replaced by: "Its mandate is set out in an ordinance."

Arar Commission Policy Review

Outline of Consultation Paper

AS OF JUNE 17, 2004

1. **Evolution of the RCMP and the Canadian security/intelligence landscape**

(a) What is the RCMP

(i) General introduction and mandate

(ii) Function and composition

(1) Organization and composition

(2) Duties and functions

(3) Accountability mechanisms, including rules and regulations, standards, code of conduct and ministerial directives

(b) What is the RCMP's national security function?

(i) Evolution of functions

(1) Confederation to McDonald Report

(2) McDonald Report to 9/11

(ii) 9/11 to present – national security function

(1) Statutory and contextual framework

(2) Organization of the RCMP's national security activities

(3) Role of the RCMP, including interaction with other domestic entities (eg. other federal and provincial departments and agencies [such as CSIS, CSE, Immigration, DND], and municipal and provincial police forces) and international entities (eg. agencies, police forces)

(c) Relationship between policing and national security with respect to RCMP

(i) Traditional policing function

(ii) Police independence from governmental/Executive direction

(iii) Since 9/11

(1) Intelligence-led policing

(2) Cooperation with other organizations

(a) INSETs

(b) Information sharing

(c) other

(d) Impact on fundamental values such as privacy, equality, civil liberties, human rights and democracy

2. **Review processes in Canada**

(a) Commission for Public Complaints against the RCMP

(b) Internal RCMP accountability

(c) SIRC

(d) Inspector General of CSIS

(e) CSE Commissioner

(f) Provincial models of police review

(g) Courts

(h) Auditor General

(i) Parliament

(i) Annual Reports

(ii) Parliamentary Committees

(j) Information Commissioner

(k) Privacy Commissioner

(l) Canadian Human Rights Commission

(m) Civil society and media

(n) Other

3. **Review of security/intelligence activities in other jurisdictions, with focus on models which oversee police forces engaging in such activities**:

(a) U.K.

(b) Australia

(c) New Zealand

(d) Federal Republic of Germany

(e) Belgium

(f) Norway

(g) U.S.

(h) Other

4. <u>Some options for review models</u>

(a) Status quo

(b) Enhanced powers for Commission for Public Complaints

(c) Inspector-General for RCMP national security matters

(d) CSE Commissioner-model adapted to RCMP

(e) SIRC-model adapted to RCMP

(f) SIRC common to RCMP and CSIS

(g) Parliamentary review (oversight?)

(h) Other